STATE OF MICHIGAN

COURT OF APPEALS

BRIAN NEWPORT, BRANDON NEWPORT, DRS CONSTRUCTION COMPANY, as assignee of MIKE KALISHEK, and DAVID R. SCHNEEBERGER,

Plaintiffs-Appellees,

v

CHRISTOPHER WOLFF, PAM WOLFF, MMS MORTGAGE SERVICES, LTD., and STATE OF MICHIGAN HOMEOWNERS RECOVERY FUND,

Defendant,

and

FULTON CONSTRUCTION COMPANY, INC.,

Defendant-Appellant.

UNPUBLISHED
May 20, 2010

No. 290631
Oakland Circuit Court
LC No. 2007-083061-CH

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant Fulton Construction Company, Inc. appeals as of right the order denying its motion for reasonable attorney fees and costs. We affirm.

Defendant argues that, because the construction lien claims asserted by the five plaintiffs and the breach of contract claim asserted by plaintiff David Schneeberger were frivolous, the trial court erred in denying its motion for fees and costs. We disagree.

We review a trial court's decision to award attorney fees for an abuse of discretion. *In re Clarence W Temple & Florence A Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A trial court's determination that a pleading is frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661-662. The determination whether a party is

a "prevailing party" is a question of law reviewed de novo. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 521; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1998).

"Under Michigan law, a party that maintains a frivolous suit . . . is subject to sanctions under applicable statutes and court rules." *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 404; 700 NW2d 432 (2005) (opinion by SAAD, J.). MCL 600.2591(1) provides that "if a court finds that a civil action . . . was frivolous, the court . . . shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." See also MCR 2.114(E), (F). The costs and fees to be awarded include court costs and reasonable attorney fees. MCL 600.2591(2). Pursuant to MCL 600.2591(3)(a):

> "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

A "prevailing party" is "a party who wins on the entire record." MCR 600.2591(3)(b).

In denying defendant's motion for fees and costs, the trial court stated:

> [T]he lien claims earlier asserted in this case arguably could have fit the second or third of the foregoing criteria, but those claims were asserted against the property owners, not [defendant]. Moreover, Schneeberger had sufficient evidence, i.e., his own testimony, sufficient to justify taking the claim to trial. Finally, while the Court ruled against Schneeberger at trial, the evidence did not compel a finding that the primary purpose of the action was harassment or injury, that Schneeberger lacked a reasonable basis for believing his claim, or that his position was devoid of arguable legal merit.

Defendant first claims that, because the construction lien claims were asserted against it and because plaintiffs, in order to prevail, were required to establish defendant's "underlying contractual indebtedness," the trial court erred in its determination that defendant was not a prevailing party to the lien claims. Defendant further argues that the lien claims were devoid of arguable legal merit.

The Construction Lien Act (CLA), MCL 570.1101 *et seq.*, serves two purposes: (1) to protect the rights of lien claimants to payment for expenses, and (2) to protect property owners from paying twice for the expenses. *DLF Trucking, Inc v Bach*, 268 Mich App 306, 311; 707 NW2d 606 (2005). MCL 570.1107(1) provides:

> Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the

> owner or lessee who contracted for the improvement to the real property, as described in the notice of commencement given under [MCL 570.1108 or MCL 570.1108a], the interest of an owner who has subordinated his or her interest to the mortgage for the improvement of the real property, and the interest of an owner who has required the improvement. A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract.

A construction lien gives the lienor an in rem interest in the improved property. *Old Kent Bank of Kalamazoo v Whitaker Constr Co*, 222 Mich App 436, 439; 566 NW2d 1 (1997). "Although the proceeding to foreclose on the construction lien originates from the contract, it is an action directed at the property rather than the person or entity who contracted for the services and is separate and distinct from an action for breach of contract." *Dane Constr, Inc v Royal's Wine & Deli*, 192 Mich App 287, 292-293; 480 NW2d 343 (1991).

In the construction lien claims, plaintiffs alleged that defendant failed to pay them. However, the lien claims were separate and distinct from any action for breach of contract against defendant; plaintiffs were not seeking contract damages from defendant. Rather, the five plaintiffs were seeking damages through the sale of the improved property, the log house built for Christopher and Pam Wolff. See *id.* at 293. Defendant does not claim that it had an interest in the property.[1] In fact, after the Wolffs submitted an affidavit stating that they had paid defendant for the improvements to the log house, see MCL 570.1203(1), the property was no longer subject to plaintiffs' construction liens. Summary disposition was granted on the Wolffs' motion, and the construction lien claims were dismissed. Because the lien claims were an in rem action directed at the Wolffs' property, property in which defendant had no interest, it cannot be said that defendant "won" on the claims. Accordingly, the trial court did not err in its determination that defendant was not a prevailing party to plaintiffs' construction lien claims.

Defendant also argues that the trial court erred in its determination that Schneeberger's breach of contract claim was not frivolous. According to defendant, Schneeberger knew or should have known that, at the time the complaint was filed, he had been paid in full for his work on the Wolffs' house. Defendant explains that Schneeberger had signed a waiver of lien on October 6, 2006, knew that he had not performed quality and timely work, did not perform any meaningful work between October 4, 2006, the day he fell off the roof and was injured, and October 17, 2006, the day he was terminated, and had no evidentiary support for the claim that he was owed $39,180.

Schneeberger admitted that he signed a waiver of lien on October 6, 2006. But it was his position that, by signing the waiver and other lien waivers, he was only waiving his rights with regard to the monetary amounts listed on the waivers. Defendant does not argue that such a

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[1] We reject any assertion by defendant that it was a necessary party to the construction lien claims. The CLA only requires that those persons who have an interest in the improved property that would be divested or impaired by the foreclosure of the lien be made parties to the action. MCL 570.1117(4).

position, even if legally incorrect, was devoid of arguable legal merit. "Not every error in legal analysis constitutes a frivolous position." *Kitchen*, 465 Mich at 663. Thus, the October 6, 2006 waiver of lien does not render Schneeberger's claim for payment for services rendered before October 6, 2006, frivolous. In addition, much of defendant's argument rests on the fact that the trial court rejected Schneeberger's trial testimony. However, the fact that a plaintiff does not ultimately prevail on a claim does not render the claim frivolous. *Kitchen*, 465 Mich at 662. The determination whether a claim is frivolous must be based on the circumstances at the time the claim is asserted. *Jericho Const, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). Schneeberger testified that until defendant terminated him on October 17, 2006, he had not received any complaints regarding the timeliness or quality of his work. He also produced a sworn statement, created before trial, which detailed the $39,180 he claimed he was owed by defendant. Defendant fails to persuade us that at the time the complaint was filed, defendant had no reasonable basis to believe that the facts underlying his claim for breach of contract were not in fact true. The trial court did not clearly err in finding that Schneeberger's breach of contract claim was not frivolous.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto